United Nations A/HRC/27/47

General Assembly

Distr.: General
30 June 2014

Original: English

Human Rights Council
Twenty-seventh session
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Working Group on Arbitrary Detention*

A compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court

Chair-Rapporteur: Mads Andenas

Summary

The present report, submitted pursuant to Human Rights Council resolution 20/16, provides an overview of the national, regional and international laws, regulations and practices on the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before court, in order that the court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is not lawful.

In that regard, the Working Group on Arbitrary Detention sought, by means of a questionnaire, the views of States, relevant United Nations agencies, intergovernmental organizations, treaty bodies, particularly the Human Rights Committee, other special procedures, national human rights institutions, non-governmental organizations and other relevant stakeholders.

The report is a compilation of the information submitted by stakeholders and is the result of an independent review of relevant international and regional legal frameworks. This exercise was undertaken as a first step in the Working Group's preparation of draft basic principles and guidelines on remedies and procedures on the right of anyone deprived of his or her liberty to challenge the lawfulness of detention before court.

* The annex to the present report is circulated in the language of submission only.

GE.14-07008 (E)

1407008

Please recycle

Contents

		Paragraphs	*Page*
I.	Introduction	1–5	3
II.	International legal framework	6–48	4
	A. Uniform adoption of the right to challenge the lawfulness of detention before court	7–20	4
	B. Non-derogability of the right to challenge the lawfulness of detention before court	21–32	8
	C. Exercise of the right by vulnerable groups	33–48	11
III.	Regional legal frameworks	49–60	15
	A. Africa	50–51	15
	B. Americas	52–57	16
	C. Arab region	58	17
	D. ASEAN region	59	18
	E. Europe	60	18
IV.	National legal frameworks	61–63	18
V.	Conclusion	64–65	19
Annex			
	Catalogue of national legal frameworks citing the right to challenge the lawfulness of detention before court		21

I. Introduction

1. The International Court of Justice has stated that "wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights".[1] In 1991, the Commission on Human Rights established the Working Group on Arbitrary Detention to investigate detention imposed arbitrarily and inconsistently with international standards in the Universal Declaration of Human Rights and legal instruments accepted by the States concerned (E/CN.4/RES/1991/42). The Working Group is the only Charter-based (or non-treaty-based) mechanism whose mandate expressly provides for consideration of individual complaints. Its actions are based on the right of petition for individuals anywhere in the world. The opinions of the Working Group are reported to the Human Rights Council, which urges Member States to cooperate and comply with the Working Group and its opinions, and where States make statements about international and domestic law, and human rights obligations in conventions and customary international law, and their own and other States' compliance with these.

2. The Human Rights Council, in its resolution 20/16, encourages all States to "respect and promote the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before court, in order that the court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is not lawful, in accordance with their international obligations" (A/HRC/RES/20/16, para. 6 (d)). The Council requested the Working Group to prepare, and to present to it before the end of 2015, draft basic principles and guidelines on remedies and procedures to assist Member States with their compliance (ibid., para. 10).

3. The Working Group was directed to seek the views of States, United Nations agencies, intergovernmental organizations, treaty bodies, particularly the Human Rights Committee, other special procedures, national human rights institutions, non-governmental organizations and other stakeholders. In 2013, the Working Group distributed a questionnaire on the treatment of the right to challenge the lawfulness of detention before court in the respective legal frameworks. It received responses from 44 States, 20 national human rights institutions, eight non-governmental organizations, five special procedures mandate holders, three regional entities and one of the treaty bodies.

4. The report is divided into three sections. The first section sets out the international human rights treaties, standards, and reports and jurisprudence of international mechanisms on the right to challenge the lawfulness of detention before court. The second section sets out the regional legal framework, including treaties, standards and jurisprudence of regional mechanisms relating to the right to challenge the lawfulness of detention before court. The third section, which constitutes the annex to the report, presents, in tabular format, national legal provisions relating to the right to a court review, as submitted by Member States to the Working Group.

5. The report does not attempt to be exhaustive in its citation of relevant legal instruments and jurisprudence but rather to show the general practice accepted as law in the international practice, representations by states and universal adoption of legal guarantees for the procedural right of anyone deprived of his or her liberty to challenge the lawfulness of his or her detention.

[1] *United States Diplomatic and Consular Staff in Tehran*, Judgment, *ICJ Reports 1980*, p. 42.

II. International legal framework

6. Although article 9 of the Universal Declaration of Human Rights establishes that "no one shall be subjected to arbitrary arrest, detention or exile", persons deprived of their liberty are frequently unable to benefit from legal resources and guarantees that they are entitled to for the conduct of their defence as required by law in any judicial system and by applicable international human rights instruments (A/HRC/10/21, para. 45). A defining element of the deprivation of liberty is the inability of those who are in detention to defend and protect themselves, as their daily life is largely dependent on the decisions taken by the staff at the detention facilities (ibid., para. 46). In such an environment, persons deprived of their liberty not only have difficulties in verifying the lawfulness of their detention, but also find themselves subjected to a lack of an effective control of their other rights (ibid., para. 47). Nonetheless, the right to bring such proceedings before court is well enshrined in treaty law and customary international law and constitutes *jus cogens*, as observed by the Working Group in its deliberation No. 9 (2013) concerning the definition and scope of arbitrary deprivation of liberty under customary international law (A/HRC/22/44).

A. Uniform adoption of the right to challenge the lawfulness of detention before court

7. The right to challenge the lawfulness of detention is set out in a number of the core international human rights instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Convention for the Protection of All Persons from Enforced Disappearance, the Convention on the Rights of the Child, the Convention relating to the Status of Refugees (of 1951) and the Protocol relating to the Status of Refugees (of 1967), the International Convention on the Protection the Rights of All Migrant Workers and Members of Their Families, and the Convention on the Rights of Persons with Disabilities.

8. In addition, there are several non-binding international human rights instruments including the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), and the Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention. They provide valuable guidance in interpreting and implementing the requirements of the core human rights treaties and customary international law and are often relied upon by special procedures and treaty bodies in their work.

9. Other international human rights mechanisms than the Working Group on Arbitrary Detention have clarified the scope and content of the right to challenge the lawfulness of detention before court. Treaty bodies, in particular the Human Rights Committee, the Committee Against Torture, the Committee on Enforced Disappearances, the Committee on the Rights of the Child, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of Persons with Disabilities have all addressed this right in their concluding observations, individual communications or general comments. The Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has addressed the right in its country visit reports, annual reports and statements. Observations on the exercise of the right have also featured in the annual, country visit or joint reports of several special procedures mandate holders, including the Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or

punishment, the Special Rapporteur on freedom of religion or belief, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, and the Special Rapporteur on the human rights of migrants.

10. The right to challenge the lawfulness of detention before court and to a remedy follow from the combined reading of articles 8 and 9 of the Universal Declaration of Human Rights, whereby "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law" and "no one shall be subjected to arbitrary arrest, detention or exile". A comprehensive articulation of that right is found in article 9, paragraph 4, of the International Covenant on Civil and Political Rights, which states that "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful". Where persons deprived of liberty are not able to exercise this right, such as in cases of suspected enforced disappearance, the International Convention for the Protection of All Persons from Enforced Disappearance, in article 17, paragraph 2 (f), obligates State parties to "guarantee that ... any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel, shall, in all circumstances, be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty and order the person's release if such deprivation of liberty is not lawful".

11. Principles 4, 11 and 32 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment make a significant contribution. Principle 4 states that "any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority". In respect to the prescribed mechanism for such proceedings, principle 11 states: "1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law. 2. [...] 3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention." The accessibility of such proceedings is set out in principle 32: "1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful. 2. The proceedings ... shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority."

12. The Working Group on Arbitrary Detention and the Human Rights Committee have delivered extensive guidance on the scope and content of this right. The Committee against Torture, the Subcommittee on Prevention of Torture and the Working Group on Enforced or Involuntary Disappearances have highlighted the importance of the procedural guarantee in their general comments, public statements, and country visit or annual reports.

13. The Working Group on Arbitrary Detention has consistently maintained that the right to challenge the lawfulness of detention before court is a self-standing human right, the absence of which constitutes a human rights violation per se (A/HRC/19/57, para. 61). The right to challenge the lawfulness of detention is frequently denied in circumstances where a detainee has never been formally charged or brought before a judge, has been held incommunicado or in solitary confinement, or has been denied an effective possibility or remedy to challenge his or her detention (Working Group opinions 33/2012 and 38/2012). The obstacles observed by the Working Group in mounting such a challenge include the

inability to access legal counsel or any source of information on commencing the procedure, the high cost of filing an application, lengthy court reviews, the inability to access evidence, the inability to appear before the court, and prolonged custody (A/HRC/19/57, para. 63). Violation of procedural guarantees often occurs in administrative detention and in rehabilitation centres (Working Group opinions 19/2012 and 22/2012). The detainee may have been ordered to be released following a successful challenge, yet remains in detention (see, for example, Working Group opinions 08/2011 and 14/2011). Where due process rights are denied, a State cannot rely on the excuse of lack of administrative capacity (Working Group opinions 21/2004 and 46/2006).

14. The Human Rights Committee has interpreted the content and scope of the right to challenge the lawfulness of detention in its general comment no. 8 (1982) on article 9 (right to liberty and security of persons) and in its jurisprudence. The objective of the procedural right is release from ongoing unlawful detention. "Unlawful detention" includes both detention that violates domestic law and detention that is incompatible with the requirements of article 9, paragraph 1, or with any other relevant provision of the International Covenant on Civil and Political Rights.[2] Unlawful detention may have been lawful at its inception but has become unlawful, because the individual has completed a sentence of imprisonment, or because the circumstances that justify the detention have changed.[3]

15. The Human Rights Committee has clarified the universal application of the right to challenge the lawfulness of detention before court, which extends to all situations of deprivation of liberty, including detention for the purposes of criminal proceedings, military detention, security detention, counter-terrorism detention, involuntary hospitalization, immigration detention, detention for extradition, wholly groundless arrests, house arrest, solitary confinement, administrative detention, detention for vagrancy or drug addiction, detention of children for educational purposes, and other forms of administrative detention.[4] No category of detainees may be denied taking such proceedings.[5]

16. The right to challenge the lawfulness of detention before court applies from the moment of arrest, and there should be no substantial waiting before bringing a first challenge.[6] Proceedings may be commenced by either the detainee or his or her representative, and do not require an automatic initiation of review by the authorities

---

[2] Communications Nos. 1255/2004 et al., *Shams et al.* v. *Australia*, para. 7.3; 1460/2006, *Yklymova* v. *Turkmenistan*, para. 7.4 and 1751/2008, *Aboussedra* v. *Libyan Arab Jamahiriya*, para. 7.6.

[3] Communication No. 1090/2002, *Rameka* v. *New Zealand*, paras. 7.3 and 7.4.

[4] Communications Nos. 248/1987, *Campbell* v. *Jamaica*, para. 6.4 (criminal proceeding); 962/2001, *Mulezi* v. *Democratic Republic of the Congo*, para. 5.2 (military detention); 1051/2002, *Ahani* v. *Canada*, para. 10.2 (counter-terrorism); 1061/2002, *Fijalkowska* v. *Poland*, para 8.4 (involuntary committal to psychiatric institution); 560/1993, *A.* v. *Australia*, para. 9.5 (immigration detention); 291/1988, *Torres* v. *Finland*, para. 7.4 (extradition); 414/1990, *Mika Miha* v. *Equatorial Guinea*, para. 6.5 (presidential fiat) and 265/1987, *Vuolanne* v. *Finland*, para. 9.5 (solitary confinement). Concluding observations: India (1997), para. 438; Israel (1998), para. 317 (security detention); United Kingdom (2008), para. 17 (counter-terrorism); Rwanda (2009), para. 16 (recommending abolition of detention for vagrancy); Cameroon (1994), para. 204; Republic of Moldova (2002), para. 11; and Lithuania (2004), para. 13.
Communications Nos. 1460/2006, *Yklymova* v. *Turkmenistan*, para. 7.2–7.4 (house arrest) and 1172/2003, *Madani* v. *Algeria*, para. 8.5 (house arrest).

[5] Communications Nos. R.1/4, *Torres Ramírez* v. *Uruguay*, para. 18; and 1449/2006, *Umarov* v. *Uzbekistan*, para. 8.6.

[6] Communication No. 291/1988, *Torres* v. *Finland*, para. 7.2 (seven days).
Concluding observations: Sri Lanka (1995) (one year).

detaining the individual.[7] Detainees should be informed, in a language that they understand, of their right to take proceedings for a decision on the lawfulness of their detention and should be afforded prompt and regular access to counsel.[8]

17. A "court" must be established by law, and must either be independent of the executive and legislative branches or must enjoy judicial independence in deciding legal matters in proceedings that are judicial in nature.[9] In general, the detainee has the right to appear in person before the court, and the court must have the power to order the detainee to be brought before it. The adjudication of the case should take place as expeditiously as possible.[10]

18. The Committee against Torture, in its general comment no. 2 (2008) on the implementation by States parties of article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, has listed guarantees for all persons deprived of their liberty, including the right to challenge the legality of their detention or treatment. In its country reports, the Committee considers that a "State party must also adopt the measures necessary to guarantee the right of any person who has been deprived of their liberty to have access to an immediate remedy to challenge the legality of their detention" (CAT/C/CUB/CO/2, para. 8).

19. The Subcommittee on Prevention of Torture has adopted a provisional statement on the role of judicial review and due process in the prevention of torture in prisons (CAT/OP/2). The Subcommittee sets out requirements that must be observed so that individuals can defend themselves properly against any act by the State that might affect their rights, noting that "judicial intervention during the period of confinement, by judges other than those who determined the criminal charges, goes hand in hand with due process" (para. 14). The Subcommittee recommends that "States parties should consider effective judicial review and due process during the detention of individuals in criminal proceedings as a prerequisite for the prevention of ill-treatment or torture of persons deprived of their liberty and as a means of conferring legitimacy on the exercise of criminal justice" (para. 19). In its country reports, the Subcommittee has characterized the right to challenge the lawfulness of detention before court as a "fundamental safeguard against torture or other cruel, inhuman or degrading treatment or punishment", requiring the senior authorities in the institutions responsible for implementing habeas corpus to take the requisite steps to ensure the effectiveness of that right (CAT/OP/HND/1, para. 137).

20. Recalling article 13 of the Declaration on the Protection of All Persons from Enforced Disappearance, which provides that an investigation should be conducted for as long as the fate of the victim of enforced disappearance remains unknown, the Working Group on Enforced or Involuntary Disappearances has reinforced the importance of guaranteeing the right to challenge the lawfulness of detention before court to clarify past cases of enforced disappearances (A/HRC/4/41/Add.1, paras. 61–63). It has recommended that "habeas corpus procedures that have been suspended in contradiction to the Declaration should be reopened and investigations should be effortlessly continued in order to endeavour to clarify past cases of enforced disappearances" (para. 108). In relation to the issue of deprivation of liberty, the Working Group on Enforced or Involuntary Disappearances has emphasized the importance of the constitutional, legal and regulatory

[7] Communication No. 373/1989, *Stephens* v. *Jamaica*, para. 9.7.

[8] Concluding observations: Switzerland (1996), para. 111; and Benin (2004), para. 16.

[9] Communications Nos. 1090/2002, *Rameka* v. *New Zealand*, para. 7.4 (discussing ability of Parole Board to act in judicial fashion as a court) and 291/1988, *Torres* v. *Finland*, para. 7.2 (finding review by Minister of the Interior insufficient); and general comment No. 32, paras. 18–22.

[10] Communication No. 291/1988, *Torres* v. *Finland*, para. 7.3.

framework being in full conformity with international standards in order to protect against secret detention or disappearance (A/HRC/22/45/Add.2, para. 91).

B. Non-derogability of the right to challenge the lawfulness of detention before court

21. In its deliberation No. 9, the Working Group on Arbitrary Detention stated that the prohibition on arbitrary deprivation of liberty, and the right of anyone deprived of his or her liberty to bring proceedings before court in order to challenge the lawfulness of the detention, are non-derogable, under both treaty law and customary international law (A/HRC/22/44, para. 47). That view is consistent with the conclusions of a number of human rights mechanisms, as illustrated in the following section which deals with non-derogability of the right to challenge the lawfulness of detention in the contexts of an armed conflict, states of emergency, and counter-terrorism measures.

1. Non-derogability in armed conflict

22. International human rights law, and the rights related to liberty and security of the person in particular, apply everywhere and at all times, both in peace and in armed conflict, at home and abroad. There is agreement that the norms of international human rights instruments and customary international law protecting individuals against arbitrary detention shall be complied with by Governments in situations of armed conflict (A/HRC/16/47, para. 51).[11] International human rights law against arbitrary detention applies in parallel with the rules of international humanitarian law. International human rights law and the law of international armed conflict provide protection for individuals, and are complementary in nature. Neither provides authority for detention, and legality requires that the grounds (and procedure) be established by national law, in compliance with the further requirements of international law. That legal basis must satisfy the requirement of non-arbitrariness, and be proportionate, predictable and fair. These human rights law channels are not offered by the law of international armed conflict. This is particularly manifest given that human rights instruments set up supervisory organs with jurisdiction to provide adequate remedies to victims of breaches. When the laws of armed conflict were codified in the Geneva Conventions of 1949, the most common type of conflict was international armed conflict between States. Non-international armed conflicts between a State and non-State armed group, or between two or more non-State armed groups, are now the most common form of conflict. The treaty provisions relating to armed conflict that are applicable in such conflicts are minimal, and international human rights law provides important additional protections, as is clarified in the constant jurisprudence of the Working Group.

23. The International Committee of the Red Cross (ICRC) refers to the International Covenant on Civil and Political Rights as one of three instruments binding the States that are Parties to them.[12] Article 75, paragraph 4, of Protocol I reproduces most of the fair trial guarantees provided for in international human rights instruments. As noted in ICRC's commentaries, in each of these treaties there is a clause permitting derogations from the articles in question in times of war.[13] Article 75 is not subject to any possibility of derogation or suspension and these provisions will play an important role in armed

[11] Also the ICRC commentaries to Protocol II, para. 4429, referring to United Nations General Assembly resolution 2675 (XXV), and resolution 2675 (XXV) as cited in A/HRC/16/47, para. 45.

[12] ICRC commentaries to Protocol I, para. 2928. See also A/HRC/16/47, para. 46.

[13] Ibid., para. 3092.

conflict.[14] In Protocol II, it is emphasized in the preamble that "international instruments relating to human rights offer a basic protection to the human person". ICRC notes that this provision establishes the link between Protocol II and the international instruments on human rights.[15]

24. In its advisory opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice affirmed the applicability of the International Covenant on Civil and Political Rights during armed conflicts, save through the effect of provisions for derogation of any kind to be found in article 4 of the Covenant. The Court confirmed its view in its advisory opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (para. 106), and in its judgment of 19 December 2005 on the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* (para. 216). The complementary application of the Covenant and of international humanitarian law was addressed by the Human Rights Committee in its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant (CCPR/C/21/Rev.1/Add.13, para. 11; A/HRC/16/47, paras. 39 and 40) and in the constant jurisprudence of the Working Group on Arbitrary Detention.

2. Non-derogability in states of emergency

25. The Working Group on Arbitrary Detention attaches particular importance to effective internal control mechanisms over the legality of detention. The remedy of habeas corpus is one of the most effective means of preventing and combating arbitrary detention. Procedural guarantee must not be suspended or rendered impracticable in states of emergency (A/HRC/7/4, para. 64; E/CN.4/1995/31, para. 25 (d)). The Subcommittee on Prevention of Torture has recommended that "the effectiveness and absolute non-derogability of habeas corpus be guaranteed in states of emergency" (CAT/OP/HND/1, para. 137). In addition, the Committee on Enforced Disappearances has recommended the adoption of "the necessary measures to establish that the right to apply for habeas corpus may be neither suspended nor restricted under any circumstances, even when a state of emergency or siege has been declared, and to guarantee that any person with a legitimate interest may initiate the procedure" (CED/C/ESP/CO/1, para. 26).

26. The Working Group has, in its constant jurisprudence, adopted the legal analysis in the Human Rights Committee's general comment No. 29 (2001) on states of emergency (article 4), paragraphs 11 and 16. In addition to those rights enumerated in article 4, paragraph 2, of the Covenant, certain other rights are non-derogable even during a state of emergency, including the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention. These non-derogable guarantees are customary international law binding on States that are not parties to the Covenant, and are also peremptory norms of international law.

27. In 2006, a report on the situation of detainees at Guantánamo Bay was jointly issued by a group of special procedures mandate holders, including the Chair-Rapporteur of the Working Group on Arbitrary Detention, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on freedom of religion or belief and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (E/CN.4/2006/120). The group examined, inter alia, whether the right to challenge the lawfulness of detention may be limited,

[14] A/HRC/16/47, para. 48.

[15] ICRC commentaries to Protocol II, para. 4427. See also A/HRC/16/47, para. 49.

restricted or derogated from in the context of public emergencies or armed conflict. Relying on the jurisprudence of the International Court of Justice and on the Human Rights Committee's general comment No. 29 in which it is stated that "procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights", it determined that the main elements of article 9 of the Covenant, such as habeas corpus, must be fully respected even during states of emergency (E/CN.4/2006/120, para. 14).

3. Non-derogability and counter-terrorism measures

28. The Working Group has expressed its concern about the frequent use of various forms of administrative detention, entailing restrictions on fundamental rights (E/CN.4/2005/6, para. 61). It has noted a further expansion of some States' recourse to emergency legislation diluting the right of habeas corpus or amparo and limiting the fundamental rights of persons detained in the context of the fight against terrorism by means of new anti-terror or internal security legislation allowing detention for an unlimited time or for very long periods, without charge, without the detainees being brought before a judge, and without a remedy to challenge the legality of the detention (ibid.). The Working Group has observed that this kind of administrative detention, which often is also secret, aims at circumventing the legal time limits governing police custody and pretrial detention and at depriving the persons concerned of the judicial guarantees recognized to all persons suspected or accused of having committed an offence (ibid.).

29. Although it is acknowledged that counter-terrorism measures might require the adoption of specific measures limiting certain guarantees, including those relating to detention and the right to a fair trial, in a very limited manner, the Working Group has repeatedly stressed that in all circumstances deprivation of liberty must remain consistent with the norms of international law (E/CN.4/2004/3, para. 84). The right of anyone deprived of his or her liberty to bring proceedings before a court in order to challenge the legality of the detention is a personal right, which must "in all circumstances be guaranteed by the jurisdiction of the ordinary courts" (ibid., para. 85).

30. In numerous cases presented before it in recent years, as well as through information received from non-governmental organizations working in the field and national human rights institutions, the Working Group has noticed the continued practice by some States of using deprivation of liberty without charges or trial or other applicable procedural guarantees against persons accused of terrorist acts, contrary to international human rights instruments (A/HRC/10/21, para 52). The Working Group has adopted a list of principles based on articles 9 and 10 of the Universal Declaration of Human Rights and on articles 9 and 14 of the International Covenant on Civil and Political Rights (ibid., para. 53). These principles guarantee that persons detained under charges of terrorist activities shall enjoy the effective right to habeas corpus following their detention. The exercise of the right to habeas corpus does not impede on the obligation of the law enforcement authority responsible for the decision for detention or maintaining the detention, to present the detained person before a competent and independent judicial authority within a reasonable time period (ibid., para. 54 (f)).

31. In the report on the situation of detainees at Guantánamo Bay (E/CN.4/2006/120), the group of special rapporteurs recalled the jurisprudence of the International Court of Justice on the complementarity of international humanitarian law and human rights law as well as the affirmation by the Human Rights Committee in its general comment No. 31 (2004). The group of special rapporteurs stated that "international obligations regarding the struggle against terrorism might make the apprehension and detention of some of these persons a duty for all States" (ibid., para. 26). Drawing on its finding that such deprivation of liberty is governed by human rights law, and specifically articles 9 and 14 of the

International Covenant on Civil and Political Rights, this includes the right to challenge the legality of detention before a court in proceedings affording fundamental due process rights. It concluded that "any person deprived of his or her liberty must enjoy continued and effective access to habeas corpus proceedings, and any limitations to this right should be viewed with utmost concern" (ibid.).

32. More recently, a joint study on global practices in relation to secret detention in the context of countering terrorism was prepared by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on the question of torture, the Chair-Rapporteur of the Working Group on Enforced or Involuntary Disappearances and the Vice-Chair of the Working Group on Arbitrary Detention (A/HRC/13/42). They concluded that secret detention was irreconcilably in violation of international human rights law, including during states of emergency and armed conflict, and in violation of international humanitarian law during any form of armed conflict. Secret detention violates the right to personal liberty and the prohibition of arbitrary arrest or detention. No jurisdiction should allow for individuals to be deprived of their liberty in secret for potentially indefinite periods, outside the reach of the law, without the possibility of resorting to legal procedures, including habeas corpus (A/HRC/16/47, para. 54). The group of experts underlined the centrality of "effective habeas corpus reviews by independent judicial bodies" to ensuring respect for the right to personal liberty (A/HRC/13/42, para. 292 (b)). The group recommended that "domestic legislative frameworks should not allow for any exceptions from habeas corpus, operating independently from the detaining authority and from the place and form of deprivation of liberty ... The law should foresee penalties for officials who refuse to disclose relevant information during habeas corpus proceedings" (ibid.).

C. Exercise of the right by vulnerable groups

33. Further to the procedural guarantees that apply to all persons deprived of their liberty, additional safeguards are necessary for the exercise of the right to challenge the lawfulness of detention by particular vulnerable groups, including by child detainees, by detained migrants, including asylum seekers, and by persons detained involuntarily on health grounds.

1. Child detainees

34. The Convention on the Rights of the Child, in article 37 (b), obligates State parties to ensure that "no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time". It guarantees to every child deprived of his or her liberty "the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action" (art. 37 (d)).

35. Rule 13 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, on the right to challenge the lawfulness of detention, guarantees that "juveniles deprived of their liberty shall not for any reason related to their status be denied the civil, economic, political, social or cultural rights to which they are entitled under national or international law, and which are compatible with the deprivation of liberty." Rule 7.1 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) calls for the guarantee of basic procedural safeguards at all stages of the proceedings, including the right to appeal to a higher authority. The issue of release is to be considered by a judge or other competent official or body without delay (rule 10.2). In the

commentary to the Beijing Rules, "other competent official or body" is defined as any person or institution in the broadest sense of the term, including community boards or police authorities having the power to release an arrested person. Rule 20.1 provides that "each case shall from the outset be handled expeditiously, without any unnecessary delay". The commentary highlights as a paramount concern "the speedy conduct of formal proceedings in juvenile cases".

36. The Committee on the Rights of the Child has interpreted the procedural guarantees in article 37 (d) of the Convention on the Rights of the Child in its general comment No. 10 (2007) on children's rights in juvenile justice. The Committee specifies that the right to challenge the legality of the deprivation of liberty includes not only the right to appeal, but also the right to access the court, or other competent, independent and impartial authority or judicial body, in cases where the deprivation of liberty is an administrative decision. The right to a prompt decision means that a decision must be rendered as soon as possible, within or not later than two weeks after the challenge is made" (para. 84). With regard to the time limit between the commission of the offence and the decision by the court or other competent judicial body, the Committee stipulates that this should be much shorter than those set for adults, without compromising the full respect for the human rights of the child and legal safeguards (para. 52). The Committee regularly stresses the need for effective complaint procedures in general, and calls for the establishment of an "independent, child-sensitive and accessible complaint system for children" within the context of the administration of juvenile justice (CRC/C/15/Add.193, para. 62 (j); CRC/C/15/Add.198, paras. 51 and 53).

2. Detained asylum seekers and migrants in an irregular situation

37. The Convention relating to the Status of Refugees, of 1951, and its 1967 protocol, lay down basic minimum standards for the treatment of refugees, including free access to the courts of law on the territory of States parties and the ability to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specifically designated by the competent authority (arts. 16 and 32 (2) of the Convention).

38. The Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention, of 2012, published by the United Nations High Commissioner for Refugees, include respect for the detainee's right, either personally or through a representative, to challenge the lawfulness of detention before a court of law at any time (guideline 7). The guideline places the burden of proof for establishing the lawfulness of the detention on the authorities in question and requires that authorities establish the legal basis for the detention and justify it according the principles of necessity, reasonableness and proportionality, showing that less intrusive means of achieving the same objectives have been considered in the individual case (para. 47 (v)).

39. The Working Group on Arbitrary Detention has devoted particular attention to the situation of detained migrants, including migrants who are undocumented or in an irregular situation, asylum seekers awaiting the outcome of their asylum application and failed asylum seekers awaiting removal (Working Group opinions 55/2011 and 14/2011). Through its annual reports and in its deliberation no. 5 (1999) concerning the situation of immigrants and asylum seekers, the Working Group has set out a number of procedural guarantees for migrants in detention. In the case of absence, violation, circumvention or non-implementation of such procedural guarantees, the Working Group may conclude that the custody is arbitrary.

40. Procedural guarantees for detained migrants include notification of the custodial measure in writing, in a language understood by the asylum seeker or immigrant, stating the grounds for the measure, and setting out the conditions under which the asylum seeker or

immigrant must be able to apply for a remedy to a judicial authority, which shall decide promptly on the lawfulness of the measure and, where appropriate, order the release of the person concerned (E/CN.4/2000/4, principle 8). Detention must be ordered or approved by a judge or a body affording equivalent guarantees of competence, independence and impartiality (E/CN.4/1999/63, para. 69). The procedural guarantee of article 9, paragraph 4, of the International Covenant on Civil and Political Rights requires that migrant detainees enjoy the right to challenge the legality of their detention before a court. There should be automatic, regular and judicial, not only administrative, review of detention in each individual case. Review should extend to the lawfulness of detention and not merely to its reasonableness or other lower standards of review. A maximum period of detention must be established by law, and upon expiry of that period, the detainee must be automatically released (A/HRC/13/30, para. 61). Established time limits for judicial review must be obtained in "emergency situations" when an exceptionally large number of undocumented immigrants enter the territory of a State.

41. The Working Group (A/HRC/13/30/Add.2) and the Committee against Torture (CAT/C/MRT/CO/1) have called on States parties to provide access to effective judicial remedies to challenge the legality of administrative decisions on detention.

42. The Human Rights Committee has reiterated its view that the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons who may find themselves in the territory or subject to the jurisdiction of the State Party. This is articulated in general comments No. 8 (1982) on the right to liberty and security of persons, No. 15 (1986) on the position of aliens under the Covenant, and No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant (HRI/GEN/1/Rev.9 (Vol. I) p. 179, paras. 1 and 7; p. 189, para. 2; and p. 245, para. 10). The Committee affirmed that "every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed" (CCPR/C/59/D/560/1993, para. 9.4).

43. The Special Rapporteur on the human rights of migrants, in his 2012 annual report on the detention of migrants in an irregular situation (A/HRC/20/24), recalled the statement of the Working Group on Arbitrary Detention that there should be automatic, regular and judicial, not only administrative, review of detention in each individual case, and that review should extend to the lawfulness of detention and not merely to its reasonableness or other lower standards of review (ibid., para. 23). The Special Rapporteur recommended that Governments ensure that procedural safeguards and guarantees established by international human rights law and national law are applied to any form of detention (ibid., para. 72 (a)). Further, all migrants deprived of their liberty should be informed in a language they understand, if possible in writing, of the reasons for the detention and be entitled to bring proceedings before a court, so that the court can decide on the lawfulness of the detention. Migrants in detention shall be assisted, free of charge, by legal counsel and by an interpreter during administrative proceedings.

44. Article 16 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families sets out the right to liberty and security of person for migrant workers and members of their families and the right not to be subjected individually or collectively to arbitrary arrest or detention (paras. 1 and 4). It articulates that migrant workers and members of their families who are deprived of their liberty by arrest or detention are entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful (para. 8). In attending such proceedings, they are entitled to have cost-free assistance to an interpreter if they cannot understand or speak the language used (ibid.). Where it has been determined that migrant workers and members of their families have

been victims of unlawful arrest or detention, the Convention guarantees an enforceable right to compensation (para. 9).

45. The Committee on Migrant Workers has elaborated on the content of article 16 of the International Convention in its general comment no. 2 (2013) on the rights of migrant workers in an irregular situation and members of their families. The Committee has stated that the scope of the judicial review cannot be confined to a formal assessment of whether the migrant worker concerned entered the State party without a valid entry permit, without the possibility of release if the detention is not established by law (ibid., para. 32). Further reviews of the continued necessity and lawfulness of the detention should be carried out at regular intervals by a judge or other officer authorized by law to exercise judicial power. The burden of proof rests on the detaining authorities to demonstrate that the presumption in favour of liberty should be displaced. The migrant worker must have access to legal representation and advice, if necessary free of charge, to challenge the lawfulness of detention, and have timely access to effective legal remedies (ibid., para. 33; CMW/C/BIH/CO/2, para. 26). A claim for compensation may be made where the arrest or detention is found unlawful under national or international law and States parties must ensure that the right to compensation can be effectively enforced before the competent domestic authority (CMW/C/GC/2, para. 35). The Committee cautions States parties to ensure that migrant workers and members of their families are not expelled while their claim is being considered.

3. Involuntary detention of persons with a disability

46. The Convention on the Rights of Persons with Disabilities, in article 14, requires States Parties to "ensure that persons with disabilities ... are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law ... If persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law". The Committee on the Rights of Persons with Disabilities, in its general comment No. 1 on article 12 of the Convention regarding equal recognition before the law, has affirmed that respecting the right to legal capacity of persons with disabilities on an equal basis includes respecting the right of persons with disabilities to liberty and security of the person (paras. 40 and 41). It has drawn attention to the problem of denial of the legal capacity of persons with disabilities and their detention in institutions against their will, without their consent or with the consent of a substitute decision-maker. This constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention. The Committee requires States to refrain from such practices and to establish a mechanism to review cases of placement in a residential setting without specific consent.

47. The Committee has consistently held that disability is not a legitimate ground under international law for depriving persons of their liberty (CRPD/C/SLV/CO/1, paras. 31 and 32) and that deprivation of liberty solely on the basis of disability is contrary to and violates article 14 of the Convention (CRPD/C/PER/CO/1, paras. 28 and 29). Involuntary committal or institutionalization on the grounds of disability, or perceived disability, particularly on the basis of psychosocial or intellectual disability or perceived psychosocial or intellectual disability, is not in compliance with the Convention, and the Committee has called upon States to amend laws and to adopt measures to prohibit involuntary committal or internment, and to design and implement de-institutionalization strategies (CRPD/C/ARG/CO/1/ para. 23; CRPD/C/CHN/CO/1 paras. 25 and 26). The Committee has emphasized that no individual can be deprived of his or her liberty against his or her will in any kind of mental facility and that States parties are required to ensure that all mental health services are provided on the basis of the free and informed consent of the person concerned (CRPD/C/AUT/CO/1, paras. 29–31). States need to provide due process of law guarantees and appropriate judicial review to persons with disabilities deprived of

their liberty as a result of a process in which they have been declared exempt from criminal responsibility (CRPD/C/ARG/CO/1, paras. 25 and 26).

48. The Working Group on Arbitrary Detention has in its constant jurisprudence stated that all persons deprived of their liberty on health grounds must have judicial means of challenging their detention (E/CN.4/2004/3, para. 87). In its deliberation No. 7 on issues related to psychiatric detention, the Working Group stated that preventing mentally disabled persons from leaving may, in principle, amount to deprivation of liberty (E/CN.4/2005/6, para. 51). When assessing whether the measures taken are in compliance with international standards, the vulnerable position of persons affected by (alleged) illness has to be duly taken into consideration (E/CN.4/2005/6, para. 57). The Working Group applies the following criteria: Article 9, paragraph 4, of the International Covenant on Civil and Political Rights shall be applied to anyone confined by a court order, administrative decision or otherwise in a psychiatric hospital or similar institution on account of his mental disorder. In addition, the necessity whether to hold the patient further in a psychiatric institution shall be reviewed regularly at reasonable intervals by a court or a competent independent and impartial organ, and the patient released if the grounds for his detention do not exist any longer. In the review proceedings, his vulnerable position and the need for appropriate representation must be taken into consideration (E/CN.4/2005/6, para. 58 (e)).[16]

III. Regional legal frameworks

49. The right to challenge the lawfulness of detention before court is enshrined in all of the major regional human rights treaties, including the African Charter on Human and Peoples' Rights, the American Convention on Human Rights, the Arab Charter on Human Rights and the European Convention on Human Rights. It is also captured in non-binding regional instruments, such as the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, the Guidelines on Conditions of Police Custody and Pretrial Detention in Africa, the American Declaration of the Rights and Duties of Man, the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, and the ASEAN Human Rights Declaration. Furthermore, it been the subject of interpretation by the African Commission on Human and Peoples' Rights, the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights, and the European Court of Human Rights.

A. Africa

50. The African Charter on Human and Peoples' Rights, in article 7 (1) (a), guarantees "the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force". In its jurisprudence, the African Commission on Human and Peoples' Rights has pronounced that "the writ of habeas corpus was developed as the response of common law to arbitrary detention, permitting detained persons and their representatives to challenge such detention and to demand that the authority either release or justify all imprisonment" (143/95-150/96: Constitutional Rights Project and Civil Liberties Organization – Nigeria, para. 23). At its fifty-fifth session, the African Commission adopted the Guidelines on Conditions of Police Custody and Pre-Trial Detention in Africa (2014);[17] under article 5 (h), upon arrest, persons must be informed of the right to challenge their detention.

[16] See how this is reflected in national case law in *P & Q* [2014] UKSC 19.

[17] http://www.achpr.org/files/news/2013/03/d78/draft_guidelines_pre_trial_detention.pdf.

51. The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission in 2003, closely follows article 9, paragraph 4, of the International Covenant on Civil and Political Rights in section M. It details the components necessary in order to ensure exercise of the procedural guarantee, including the necessity for States to enact legislation to ensure the right. It stipulates that "anyone concerned or interested in the well-being, safety or security of a person deprived of his or her liberty has the right to a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of such a person and/or identifying the authority ordering or carrying out the deprivation of liberty". It entrusts judicial bodies to, at all times, hear and act upon petitions for habeas corpus, amparo or similar procedures, and states that no circumstances whatever must be invoked as a justification for denying the right to habeas corpus, amparo or similar procedures. These are defined as "a legal procedure brought before a judicial body to compel the detaining authorities to provide accurate and detailed information regarding the whereabouts and conditions of detention of a person or to produce a detainee before the judicial body" (section S (m)).

B. Americas

52. The American Declaration of the Rights and Duties of Man (1948) establishes that "every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released" (article XXV). Article 7, paragraph 6, of the American Convention on Human Rights provides: "Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies."

53. The Inter-American Court of Human Rights, in advisory opinion OC-8/87 (30 January 1987) on habeas corpus in emergency situations, stated that the protection is among "those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by article 27 (2) and that serve, moreover, to preserve legality in a democratic society". It is "a judicial remedy designed to protect personal freedom or physical integrity against arbitrary detentions by means of a judicial decree ordering the appropriate authorities to bring the detained person before a judge so that the lawfulness of the detention may be determined and, if appropriate, the release of the detainee be ordered."

54. In its jurisprudence, to which the Working Group on Arbitrary Detention gives great weight in its own jurisprudence, the Inter-American Court has affirmed "that the authority which decides on the legality of an arrest or detention must be a judge or court; article 7, paragraph 6 of the Convention is therefore ensuring judicial control over the deprivation of liberty".[18] "The review by a judge or a court is a fundamental requirement to guarantee adequate control and scrutiny of the administrative acts which affect fundamental rights". Remedies under article 7, paragraph 6, of the Convention "must not only exist formally in law but must be effective; in other words, they must comply with the objective of obtaining, without delay, a decision on the lawfulness of the arrest or detention."[19] "Migratory

[18] *Vélez Loor* v. *Ecuador*, para. 126.

[19] *Nadege Dorzema et al.* v. *Dominican Republic*, case No. 1351-05, para. 141.

regulations which did not establish remedies to contest the lawfulness of the arrest and detention ... but only established the possibility for the detainee to 'refute the charges' on which his or her deportation was based or to be 'heard regarding the charges indicated in the arrest warrant' or to 'provide evidence opposing the deportation' are in violation of article 7, paragraph 6".[20]

55. The Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, approved by the Inter-American Commission on Human Rights in 2008, guarantee that "all persons deprived of liberty shall have the right, exercised by themselves or by others, to present a simple, prompt, and effective recourse before the competent, independent, and impartial authorities, against acts or omissions that violate or threaten to violate their human rights" (Principle V). Further, "persons deprived of liberty shall have the right of individual and collective petition and the right to a response before judicial, administrative, or other authorities. This right may be exercised by third parties or organizations, in accordance with the law" (Principle VII).

56. The Inter-American Commission stated that it "cannot overemphasize the significance of ensuring effective supervisory control over detention as an effective safeguard". It noted that the right to challenge the lawfulness of detention before court plays a fundamental role in protecting against arbitrary arrest, clarifying the situation of missing persons, and preventing the use of torture or other cruel, inhuman or degrading treatment as an "effective assurance that the detainee is not exclusively at the mercy of the detaining authority". The Commission concluded that "the requirement that detention not be left to the sole discretion of the State agents responsible for carrying it out is so fundamental that it cannot be overlooked in any context" and the procedural guarantee "is not susceptible to abrogation. It applies in all situations of deprivation of liberty".

57. The Inter-American Commission set out the procedural requirements of the right: a judicial authority or a "quasi-judicial" board that decides petitions, not an administrative body, must have the power to order the detainee to be produced and also to release him or her. It must be impartial and different from the authority ordering and implementing the detention. A detained person has the right to petition "at all times" and the proceedings must comply with the fundamental rules of procedural fairness, including "an opportunity to present evidence and to know and meet the claims of the opposing party". The detainee must have an "opportunity to be represented by counsel or some other representative". The proceedings must occur "without delay" and "as soon as practicable". The decision to detain must be reviewed at regular intervals.

C. Arab region

58. Article 14, paragraph 6, of the Arab Charter on Human Rights (2004) guarantees that "anyone who is deprived of his liberty by arrest or detention shall be entitled to petition a competent court in order that it may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful". Any victim of unlawful arrest or detention is entitled to compensation (art. 14 (7)). The legal protections provided for in article 14 of the Charter cannot be derogated from, not even in in times of public emergency (art. 4 (1 and 2)).

[20] Ibid., para. 143.

D. ASEAN region

59. The ASEAN Human Rights Declaration (2012) guarantees the right to personal liberty and security and to be free from arbitrary arrest, search, detention, abduction or any other form of deprivation of liberty (article 12). In the Phnom Penh Statement adopting the Declaration, ASEAN and its member States reiterated their commitment to, inter alia, the Universal Declaration of Human Rights and other international human rights instruments to which ASEAN member States are parties.

E. Europe

60. Article 5, paragraph 4, of the European Convention on Human Rights (1950) provides that "everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful". Victims of unlawful arrest or detention have an enforceable right to compensation (art. 5 (5)). The European Court of Human Rights has clarified the right to court review in its extensive jurisprudence, to which the Working Group on Arbitrary Detention continues to give great weight in its own jurisprudence. The Court has stated that the purpose of article 5, paragraph 4, is to grant persons deprived of liberty the right to challenge the interference with that right through rapid, effective judicial review of the legality of the measure. The right to court review of detention in domestic legislation must be effective and real, allowing for accessibility and certainty. The procedure is to be guided by the adversarial principle and equality of arms. Generally, this requires a hearing of the detainee before the judicial organ, a body independent of the executive, with a guarantee of impartiality and the force to implement its decisions. Legal counsel is mandatory in cases of minors, internment in psychiatric centres, and cases concerning discretional life sentences. A decision should be attained in the shortest time possible. The Charter of Fundamental Rights of the European Union recognizes, in article 6, the right to liberty and security, among a range of personal, civil, political, economic and social rights of European Union citizens and residents, and enshrines them into European Union law.

IV. National legal frameworks

61. The 44 responses to the Working Group's questionnaire from United Nations Member States and the 18 from national human rights institutions are posted on the Working Group's webpage. A catalogue of Member States' relevant legal frameworks is replicated in tabular format in the annex to the present report. The prohibition of arbitrary deprivation of liberty and the right of anyone deprived of his or her liberty to bring proceedings before a court in order to challenge the legality of the detention are uniformly and generally adopted in the domestic legislation of States, usually in constitutional provisions or otherwise recognized to be of a fundamental nature in the domestic legal order. The States expressly declare in their replies to the questionnaire that they comply with international law, as they do in their reporting to other United Nations human rights bodies and in statements in the Human Rights Council and other United Nations organs. In these contexts, and in the different forms of State-to-State peer review, it is made clear that, whether or not they have ratified the International Convention on Civil and Political Rights, they regard themselves bound by international law on court review of detention.

62. The responses submitted by non-State stakeholders are also posted on the Working Group's website. These contributions have been taken into account in preparing the draft principles and guidelines on the right to challenge the lawfulness of detention. The

Working Group would like to acknowledge the very comprehensive contribution made by Oxford Pro Bono Publico at the University of Oxford, which submitted "Remedies and procedures on the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before a court: a comparative and analytical review of State practice" (April 2014). This has been of particular assistance to the Working Group in establishing State practice and the requisite *opinio juris*.

63. The Working Group recalls the statement by the International Court of Justice in *Jurisdictional Immunities*: "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them … In the present context, State practice of particular significance is to be found in the judgments of national courts".[21] In deliberation No. 9 (2012) concerning the definition and scope of arbitrary deprivation of liberty under customary international law,[22] the Working Group adopted the approach to formation of customary international law currently restated in the work of the International Law Commission (A/CN.4/663) and reflected in the request by the Human Rights Council to produce the present report. When the Working Group applies the law, and when it finds violations of human rights obligations, it is bound by the general method of international law, in treaty interpretation and the application of customary international law. In addition to the materials presented in the present report to the Human Rights Council, important sources of international law can be found in the Council's own procedures and their outcomes, with the additional reporting and peer-review procedures, including those of the universal periodic review.

V. Conclusion

64. **The present report demonstrates how the procedural guarantee has been developed in different international instruments, in regional legal frameworks, and in the domestic law of States from a diversity of legal traditions. The reaffirmation and clarification of the due process safeguard is a feature of international treaties and domestic legislation, the jurisprudence of international human rights mechanisms, including treaty bodies and special procedure mandate holders, regional human rights mechanisms and national courts. The procedural guarantee is viewed as an essential component of the due process rights that are necessary to protect the right to liberty and security of the person in all situations of deprivation of liberty and to prevent arbitrary arrest, detention or exile, enforced disappearance, or risk of torture and other cruel, inhuman or degrading treatment or punishment. The review of legal frameworks further confirms that, where it has been determined that the fundamental rights of the detainee have been violated, such wrongs demand a remedy.**

65. **The extensive survey undertaken of the relevant sources shows that the right to challenge the lawfulness of detention and the right to a remedy where there is a wrong is supported by uniform international practice, State practice and the *opinio juris* of States. It shows not only the existence of customary norms of international law that apply *erga omnes*, but also that these norms are peremptory rules, *jus cogens*, in**

[21] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*, Judgment, ICJ Reports 2012, p. 99, 122–23 [55].

[22] Deliberation No. 9 has been cited as one source on the approach to identification of customary international law by Sir Michael Wood, First Report on formation and evidence of customary international law, International Law Commission, Sixty-fifth session, 17 May 2013, (A/CN.4/663, para. 53) and in Sir Michael's Second Report (A/CN.4/672, paras 41.8 and 76.6).

accordance with article 53 of the Vienna Convention on the Law of Treaties. The concern of the survey has not been with the factual compliance with international law, domestic legislation, the jurisprudence of higher courts or statements by governments. The basic principles and guidelines on remedies and procedures on the right of anyone deprived of his or her liberty to challenge the lawfulness of detention before a court, which the Working Group is drafting at the request of the Human Rights Council, is intended as an instrument for securing and improving such compliance.

Annex

[English only]

Catalogue of national legal frameworks citing the right to challenge the lawfulness of detention before court

1. On 17 June 2013, the Office of the United Nations High Commissioner for Human Rights, in its capacity as Secretariat of the Working Group on Arbitrary Detention, transmitted a Note Verbale to the Permanent Missions to the United Nations and to the United Nations Office at Geneva informing them that, in accordance with Human Rights Council resolution 20/16 of 6 July 2012, paragraph 10, the Working Group is in the process of preparing draft basic principles and guidelines on remedies and procedures on the right of anyone deprived of his or her liberty to challenge the lawfulness of detention before court.

2. As these principles and guidelines are being developed with the aim of assisting Member States in fulfilling their obligation to avoid arbitrary deprivation of liberty in compliance with international human rights law, the Working Group was directed by the Council, in paragraph 11(a) of res. 20/16, to seek the views of Governments in their preparation. The Working Group thereby transmitted a questionnaire, requesting Governments to provide, inter alia, how Article 9(4) of the International Covenant on Civil and Political Rights is incorporated into their domestic legislation. States not party to the International Covenant were requested to provide the legal framework regulating the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before court, in order that the court may decide without delay on the lawfulness of his or her detention.

3. The questionnaire was completed and returned to the Working Group by 44 Member States. As notified, all replies have been posted on the web page of the Working Group and made available to the public.[23] The entire responses have been taken in to account in developing the draft principles and guidelines. Reproduced in tabular format below are only the national legal provisions incorporating article 9 (4) of the International Covenant, or the abovementioned right, in to domestic law.

State	*Legal instrument*	*Relevant provisions*
ARGENTINA	Constitution (Constitución Nacional)	Art. 43
	Criminal Code of Procedure(Código Procesal Penal de la Nación)	Arts. 280, 316-319
	National Mental Health Law (Ley Nacional de Salud Mental, 26.657, publicada en el Boletín Oficial el 3/12/2010)	Arts. 14, 20, 22
ARMENIA	Constitution of the Republic of Armenia	Arts. 16, 16 Part 4, 18 Part 1
	Criminal Code	Art. 348

[23] http://www.ohchr.org/EN/Issues/Detention/Pages/DraftBasicPrinciples.aspx.

State	*Legal instrument*	*Relevant provisions*
	Criminal Procedure Code	Arts. 22, 63 (17), 63 (19), 65 (24), 73, 77
	Civil Code	Art. 1064
AZERBAIJAN	Criminal Procedure Code (14 July 2014)	Arts. 14, 101.5, 384.1, 384.1.8, 449, 449.2, 451.1, 451.3, 452.1, 473
	Administrative Offences Code (11 July 2000)	Arts. 371.1.4, 373.5, 374.5, 399.6
	Law on Providing Rights and Freedoms for Detained Persons (22 May 2012)	Art. 15.1.15
BENIN	Criminal Procedure Code (Code de procedure penale en République du Benin, loi n°°2012-15 du 17 décembre 2012)	Arts. 157 (2), 206, 207, 210(1)
BOSNIA AND HERZEGOVINA	Criminal Procedure Code (CPC)	Arts. 134, 139, 436, 439
	Law on the Stay and Movement of Aliens and Asylum	Art. 101
	Law on Ombudsman for Human Rights of Bosnia and Herzegovina	Art. 24
BULGARIA	Constitution (promulg. SG 56 of 13 July 1991)	Art. 30(3)
	Criminal Procedure Code (promulg. SG 86 of 28 October 2005)	Arts. 63-65
	Health Act (Section II of Chapter Five, promulg. SG 70 of 10 August 2004)	Arts. 155-165
	Health Act (new SG 41 of 2009)	Art 61(5)
	Law on the Ministry of Interior (promulg. SG 17 of 24 February 2006)	Art. 63(4)
	Law on State Agency National Security (promulg. SG 109 of 20 December 2007; new SG 52 of 2013)	Art. 124a(7)
	Military Police Act (promulg. SG 48 of 24 June 2011)	Art. 13(2)
	Law on Responsibility of the State and Municipalities for Damages	Art. 2(1)
BURKINA FASO	Constitution (La Constitution du 11 juin 1991)	Arts. 3, 4
	Criminal Code (La loi no. 43-96 du 13 novembre 1996 portant Code pénal et modifiée par la loi no. 6-2004 du 6 avril 2004)	Arts. 141-148, 356-360, 398-405

State	*Legal instrument*	*Relevant provisions*
	Criminal Procedure Code (L'ordonnance no. 68-7 du 21 février 1968 portant Code de Procédure Pénal ensemble ses modificatifs)	Arts. 136-150, 393-397
	Civil Procedure Code (La loi no. 22-99 du 18 mai 1999 portant Code de procédure civile)	Arts. 2, 3
CHILE	Constitution (Constitución Política de la República, publicada en el Diario Oficial el 22 de septiembre de 2005)	Art. 19, 21
	Code of Criminal Procedure (Código Procesal Penal, Ley no. 19.696 publicado en el Diario Oficial el 12 de octubre de 2000)	Art. 94, 95, 140
COLOMBIA	Constitution (Constitución Politica de Colombia de 1991)	Art. 30
	Law 1095 of 2006 (la Ley 1095 de 2006)	Arts. 1-10
ECUADOR	Constitution (Constitución de la República del Ecuador, Registro Oficial 449 de 20-oct-2008)	Art. 89
	Law of Fair Trial and Constitutional Control (Ley Orgánica de Garantías Judiciales y Control Constitucional, Registro Oficial Suplemento 52 de 22-oct-2009)	Arts. 43, 44
	Code of Criminal Procedure (Código de Procedimiento Penal, Registro Oficial Suplemento 360 de 13-ene-2000)	Arts. 422, 428
ESTONIA	Police and Border Guard Act (2009)	Art. 733(5)
	Mental Health Act (1997)	Art. 13(5)
	Law of Criminal Procedure	Art 217(7)
GEORGIA	Constitution (24 August 1995)	Art. 18(7)
	Criminal Procedure Code of Georgia (CPCG, 9 October 2009)	Arts. 38(1), 92(1), 176(5), 207
	Administrative Offences Code of Georgia (AOCG)	Arts. 251, 281
	The Law of Georgia on Mutual Legal Assistance in Criminal Matters (MLACM)	Arts. 30, 54
	Law of Georgia on Cooperation of Georgia with the International Criminal Court (CGICC)	Arts. 19(1), 23(5), 24(1)

State	*Legal instrument*	*Relevant provisions*
GERMANY	Constitution (Basic Law, Grundgesetz GG)	Art. 104(2)
	Code of Criminal Procedure (Strafprozessordnung (StPO))	Sections 115a, 117, 118, 299
GREECE	Constitution	Art. 6
	Code of Criminal Procedure	Arts. 279(2), 285, 288, 533
GUATEMALA	Constitution (Constitución Política de la República, entró en vigencia el 14 de enero de 1986)	Art. 263
	Amparo, Habeas Corpus and Constitutionality Law. Decree 1-86 (Ley de Amparo, Exhibición Personal y de Constitucionalidad, Decreto número 1-86, entro en vigencia el 14 de enero de 1986)	Art. 82, 85, 86-87
IRAQ	Constitution (2005)	Art. 4
	Criminal Procedure Rules Law (No. 23 of the year 1971)	Arts. 249, 252, 270 and 271
	Prison Administration Law	Section 13 (5)
IRELAND	Constitution (1937)	Art. 40.4
	Immigration Act (1999)	Section 5(5)
	Immigration Act (2003)	Section 5(4)
	Refugee Act (1996)	Section 9 (8-16)
	Rules of the Superior Courts	Order 84 Rule 2
JORDAN	Code of Criminal Procedure	Arts. 107, 108/2
KAZAKHSTAN	Constitution	Art. 16
	Code of Criminal Procedure	Arts. 39, 40, 41, 43, 103, 104, 105, 109, 110(1), 111, 399
	Code of Administrative Offences (CAO)	Arts. 633, 657, 658, 678
KENYA	Constitution (27 August 2010)	Arts. 20(2), 22(1), 22(2), 22(3), 23(3), 25(d), 165(3)
KUWAIT	Code of Criminal Procedure	Art. 14
	Law 17 of 1960	Art 69
LEBANON	The response provided was not included as the submission did not correspond precisely to the exigencies of the information sought.	
LITHUANIA	Code of Criminal Procedure	Arts. 130 Part 1&2, 140 Part 8
	Code of Administrative Offences (CAO)	Art. 271, 275

State	*Legal instrument*	*Relevant provisions*
	Law on Compensation for Damage Inflicted by Unlawful Actions of State Institutions and the Representation of the State	Art. 3 (Part 1)
MEXICO	Constitution (Constitución política de los Estados Unidos Mexicanos)	Arts. 1, 14, 16, 17, 18, 19, 103 and 107
	Military Code (Código de Justicia Militar)	Arts. 80, 492,505, 507, 509, 514, 616
	National Commission on Human Rights Law (Ley de la Comisión Nacional de los Derechos Humanos)	Regulates the role of the NCHR
	Amparo Law (Ley de Amparo)	Arts. 6, 15, 17, 77, 107.II, 108
	Victims' Law (Ley General de Víctimas)	Art. 2
MONACO	Sovereign Ordinance No. 13.330 of 12 February 1998	Includes Art.9(4) ICCPR
	Code of Criminal Procedure – amended by the Law 1.343 of 26 December 2007	Arts. 197-199, 202-202/4
	Law No. 1039 of 26 June 1981	Art. 12
NORWAY	Human Rights Act of 22 May 1999 No. 30	Sections 2, 3
	Criminal Procedure Act of May 1981 No. 25	Sections 185, 187a), 444, 445, 447
OMAN	Royal Decree No. 101/96 of 2 November 1996	Arts. 22-25
	Code of Criminal Procedure, promulgated by Royal Decree No. 97/99	Arts. 5(1), 59
PARAGUAY	Constitution (Constitución Nacional)	Art. 133
	Criminal Procedure Code (Código Procesal Penal de la República del Paraguay)	Art. 240
QATAR	Code of Criminal Procedure	Arts. 157, 396
REPUBLIC OF KOREA	Constitution (1948)	Art. 12.6
	Criminal Procedure Act (adopted in 1980, amended in 1987, 1995, 2005 and 2007)	Art. 214-2
	Habeas Corpus Act (2007, amended in 2008)	Art. 3
	Administrative Litigation Act	No provisions specified

State	*Legal instrument*	*Relevant provisions*
RUSSIAN FEDERATION	Constitution	Art. 46 (2)
	Code of Administrative Offences of the Russian Federation No. 195-FZ of 30 December 2001	Arts. 30.2
	Code of Criminal Procedure	Arts. 125, 126, 133(3), 135, 136
	Civil Code	Art. 1070(1)
	Federal Constitutional Act No. 1-FKZ of 26 February 1997 on the Human Rights Ombudsman (as amended on 28 December 2010)	Art. 29, paragraph 1, point 3
SENEGAL	The response provided was not included as the submission did not correspond precisely to the exigencies of the information sought.	
SLOVENIA	Constitution (23 December 1991)	Art 20
	Criminal Procedure Act	Arts. 157(7), 202(4), 538, 542(1)&(3)
	Mental Health Act	Arts. 12-14
	Aliens Act	Arts. 76, 78
	Asylum Act	Art. 27
SPAIN	Constitution (Constitución Española de 29 de diciembre 1978)	Art. 17.4
	Organic Law 6/1984 of 24 May 1984 (Ley Orgánica 6/1984, de 24 de mayo, reguladora del procedimiento de «Habeas Corpus»)	No express provisions cited
	Organic Law 5/2000 of 12 January 2000 (Ley Orgánica 5/2000, de 12 de enero, reguladora de la responsabilidad penal de los menores)	Art. 17.6
	Law 1/2000 of 7 january 2000 (Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil (Vigente hasta el 22 de Julio de 2014)	Art. 763
	Royal Decree of 14 September 1882 (Real Decreto de 14 de septiembre de 1882, aprobatorio de la Ley de Enjuiciamiento Criminal: arts. 489 a 501)	Arts. 489-501
	Penal Code (Código Penal)	Art. 530
SRI LANKA	Constitution	Art. 126

State	*Legal instrument*	*Relevant provisions*
SUDAN	The response provided was not included as the submission did not correspond precisely to the exigencies of the information sought.	---
SWEDEN	The response provided was not included as the submission did not correspond precisely to the exigencies of the information sought.	---
SWITZERLAND	Federal Constitution of the Swiss Confederation of 18 April 1999 (Cst., Recueil systématique RS 101)	Arts. 31(3), 31(4)
	Criminal Procedure Code (5 October 2007 RS 312.0)	Arts. 224-228, 230, 233
	Criminal Code (21 December 1937 RS 311.0)	Arts. 62d, 64b
	Federal Act on International Mutual Assistance in Criminal Matters (20 March 1981 RS 351.1)	Art. 48
	Code of Juvenile Criminal Procedure (20 March 2009 RS 312.1)	Art.27
	Civil Code (10 December 1907 RS 210)	Arts. 426, 426(4), 450
	Federal Act on Foreign Nationals (16 December 2005 RS 142.20)	Art. 80
TURKEY	Code of Criminal Procedure	Arts. 101(5), 104(1), 104(2), 105, 141
UGANDA	Constitution of the Republic of Uganda, 1995	Arts. 23(7), 50(1), 50(2)
	Police Act, Cap 303, Laws of Uganda 2000	Sections 24(4), 25(3)
	Government Proceedings Act, Cap 77, Laws of Uganda 2000	Sections 3, 10
	Judicature Act. Cap 13, Laws of Uganda 2000	Rule 3, Rules SI 13-6, Rules SI13-14, Section 34(1)(a)
UKRAINE	Constitution	Art. 29
	Code of Criminal Procedure (20 November 2012)	Art. 316 para 2
	Act on Procedures for Compensating Citizens for Damages caused by the Unlawful Activities of Police, Pretrial Investigation, Procuratorial and Judicial Institutions	Arts. 2, 11
UZBEKISTAN	Constitution	Art. 44

State	*Legal instrument*	*Relevant provisions*
VENEZUELA, BOLIVARIAN REPUBLIC OF	Constitution of the Bolivarian Republic of Venezuela (Constitución de la República Bolivariana de Venezuela, 1999)	Art. 27
	Code of Criminal Procedure (Código Orgánico Procesal Penal, amended in June 2012)	Art. 123
	Law on Protection of Rights and Constitutional Guarantees (Ley Orgánica de Amparo sobre Derechos y Garantías Constitucionales)	Arts. 38, 39